Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 362.

THE CREEDE AND CRIPPLE CREEK MINING COMPANY, Petitioner,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, Respondent.

REPLY BRIEF OF PETITIONER.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1902

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THE CREEDE AND CRIPPLE CREEK MINING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

REPLY BRIEF OF PETITIONER.

The respondent's citation from Forsyth *vs.* Hammond, 166 U. S., 514, emphasizes the necessity presented by this record for the issuance of the writ; for "the circumstances of the case" will, we think, satisfy the court not only of "the importance of the question involved," but also of "the necessity of avoiding conflict between two courts of appeal." If the decision herein complained of shall stand, not only will the integrity of two lode patents of the Government be immediately assailed by parol testimony, but a brood of litigation will gather under the wings of the Federal courts, wherein

so-called tunnel rights will challenge the validity of other patented properties upon the plea that they were "entered" after the tunnels were located on paper. Indeed, we know of no decision in mining law that could be more fruitful of controversy than that of the Court of Appeals in this case if it shall stand unchallenged.

Counsel have sought to establish a distinction between the decision of his honor Judge Sanborn and that of this court in the Calhoun-Ajax case. But neither they nor his honor can do more than to say that in the one case the entry preceded by a short time, and in the other succeeded by a short time, the date of the tunnel location. No such distinction was so much as hinted at in the Calhoun-Ajax decision, and unless this court shall determine that the doctrine of relation as applied to a land patent shall be determined by the date of the entry, the slight difference of fact between the cases can make no difference whatever in the application of the same law to both. Neither a "careless" nor a careful reading of the Calhoun-Ajax decision can lead to any other conclusion.

Counsel say that in the case last referred to "there were only two parties interested in the claims, the locators thereof and the United States," and that as "between these parties the decision of the Land Office was controlling." Were any other parties interested in the application of petitioners? *Their claims were located before the tunnel site.* Their subsequent *entry*, under every decision of *this* court, *related back to the date of location*, and it is wholly immaterial whether the tunnel was located the day before or the day after the entry was made. It is the *location* of the claim, not its *entry*, that determines the right of the owner. It would be a strange anomaly, indeed, if tunnel A, located the day before the entry of claim B, could attack its integrity, while tunnel C, located the day after such entry, would be concluded thereby. Such a doctrine not only violates the decision in Calhoun

vs. Ajax, it is opposed to every authority of this court upon the subject.

It is true, as counsel suggests, that a location certificate of a mining claim, when rejected by statute, is only *prima facie* evidence of the facts recited. But it is equally true that when a patent is lawfully and regularly obtained therefor and thereunder, it relates back to such location. *It takes effect then*, and the recitals of the certificate of location are thereby made conclusive. Thus far this court has never expressly recognized any exception to the rule.

The Tyler-Last Chance case was affirmed here, but upon other grounds exclusively. The question we are considering is not discussed at all. The court construed a previous judgment between the parties thereto as conclusive of the question of priority (157 U. S., 683). We may, therefore, consistently contend that the decision of the Court of Appeals in that case, on the question of relation, was *obiter dictum*. But if we turn to the case as reported in the court below we learn that both of the lode claims in controversy had been previously patented, and the controversy between them concerned extralateral rights claimed by each through their respective locations. They originally conflicted in their external boundaries, one adversed the other's application for patent, a judgment was taken by default, and, the conflict being adjudged to the adversor, both were patented. It would seem that these facts precluded any question as to which claim had the prior right. But the adversed claim being the older location, sought to avoid the consequences of the judgment, and the trial court permitted the parties to offer evidence showing the actual date of discovery in each claim, notwithstanding the patents and the respective dates of location. This procedure was approved by the Circuit Court of Appeals, which said:

"*There is no conflict between them as to surface ground. Both claims are valid and both have the Government title, one by patent; the other by a receipt and certificate of entry from the*

United States Land Office, which as before stated is the substantial equivalent for a patent."

Now we may concede *arguendo* that this doctrine is correct, and it does not affect the question. Here we have a conflict between the tunnel and the lode claims it crosses. Here the lode claims are senior to the tunnel location. Here any question of extralateral right is absent. Here the patent issued on a formal application, and the entry was allowed only on proof of discovery as required by the Department regulations. Here the respondent has driven his tunnel through petitioner's older claims, thus invading premises previously segregated from the public domain by the act of discovery and location and afterwards confirmed by entry.

It may be proper before leaving the Tyler-Chance case to say that the parol testimony there introduced as to the date of discovery was first offered by the Chance people *without objection*. Then when the Tyler claimants sought to rebut such testimony, the Chance people objected, which by reason of these facts seems to have been properly overruled.

The only theory on which the Calhoun-Ajax case can be harmonized with the decision in the case at bar is that by the former it was decided that a patent when issued takes effect only from the date of entry, instead of the date of location. But this would be merely to say that this is no relation whatever, since the entry is virtually the patent itself. *To say that the actual time of discovery instead of the date of location is the time at which the patent takes effect is to say that by parol proof it might be made to take effect subsequent to its date, for the evidence might so determine. On the other hand, such evidence might show that no discovery ever was made. In that event, would it be said the Government title was of no effect whatever?*

His honor Judge Sanborn says "it is a flagrant attack upon a patent to attempt to maintain a claim subsequent

to the entry on which it rests," but that "it is no such attack to assert the rights of the claimant of a tunnel site located before the entry, because, under the statutes and the law, such a patent always issues subject to those rights." We respectfully challenge the statement.

If it be true, a tunnel claimant may make a location of his tunnel within an hour prior to the lode entry and thereby make an attack upon it that is not flagrant, but lawful. If he delays two hours and then attacks, his action is flagrant. Is it not clear that by this decision the doctrine of relation is not modified, but destroyed? The *entry* is the title. The *patent* merely evidences it. It is meaningless to say that a patent relates to the entry, for that is its date. If it is to relate at all, it must go back to an earlier time.

Strange, if the decision in this case be the law, that the distinction between entry and location, as affecting the integrity of a patent and its conclusiveness as to the regularity of all antecedent requirements, was not somewhere announced long ago.

These considerations seem to flow logically from the dangerous notion that a patent may in effect be collaterally attacked by introducing parol evidence to shift the date of its operation from one date to another, as a jury may believe one witness or another.

Justice Field once said of a mineral patent that "its potency was iron-clad against all mere speculative inferences." Had he lived to read the opinion of the Circuit Court of Appeals in this case, he must either have disapproved it or revised his own views upon the subject; for presumptions once supposed to be conclusive are overthrown or disregarded by it, while parol testimony as to their presence or absence may be introduced thereunder without restraint.

It must not be overlooked that the respondent's contention, if sustained and followed by proof to support it (which we do not concede), does more than postpone the effect of the patent to the date of entry. It robs it of its value. For if it can prove

that the discovery was not when stated in the location certificate and confirmed by the patent, it can, if the facts admit, establish its own right to the ores in the claim, without which it is worthless. Of what avail is petitioner's title to the surface if its ores may be appropriated by another? Of what moment is the sanctity of its patent if the thing for which it was granted can be taken with impunity by one who has no patent and merely asserts a tunnel location younger than the lode claim but older than the entry?

Counsel advert to the fact that this court, in the Calhoun-Ajax case, summarily disposed of the error there assigned to the refusal of the trial court to permit the plaintiff in error to prove that at the time of the location of the Ithica tunnel site no ore had been discovered in the mining claims in controversy, and devoted but one or two sentences to it. This circumstance seems to us conclusive. It means that the question was too plain for discussion and had been too often decided to need elaboration. Your honors said:

"The ruling was right. The patents are proof of discovery and related back to *the date of the location of the claims. The patents could not be collaterally attacked.* This has been decided so often that a citation of cases is unnecessary."

Yet the Circuit Court of Appeals has expressly declared that our patents *can* be attacked collaterally, hence we are here appealing for protection. The trial court followed the Ajax case. It obeyed the ruling of this court. The Court of Appeals has overthrown that ruling, reversed our judgment, and ordered the trial court to receive parol testimony to determine whether we have any title whatever, and if so, what the date of it may be. We respectfully submit that no case cited, either in his honor Judge Sanborn's opinion or the counsels' brief, supports the proposition that a patented lode claim *senior in location to alleged rights coming in conflict with the premises included within its boundaries* can be made the subject of parol or collateral attack.

The case of The Rico-Aspen Company *vs.* The Enterprise Company, 167 U. S., 108, does not support the respondent's contention. In that case the "Group" tunnel was located and recorded long prior to the location and discovery of the "Vestal" Lode claim. Besides, the latter did not cross the line of the tunnel location, but was parallel to and five or six hundred feet away from it. The Vestal vein presumably ran with the claim, so that the tunnel never could intersect it. A blind vein cut by the tunnel crossed the Vestal at right angles, and the ownership of that vein within the Vestal boundaries was the point in controversy. The court held that the tunnel, being older than the lode claim, and not even crossing it, was, under the Federal statutes, entitled to the mineral in the vein. It did not intimate that the Vestal patent did not relate back to its location, but merely that the tunnel, being older in location, was older in right as to the blind cross-vein discovered in the tunnel.

It is true that this court there held that the senior tunnel claimant need not adverse a junior lode claim patent application, especially when there was no surface conflict. But if the tunnel be the junior location and the senior lode location directly across its line apply for patent, should not the former, if it believes the latter to be void for want of discovery of a vein therein, prevent its entry by adverse or protest? (See Tioga Mining Co. case, 8 Copp L. O., 88; Bodie Tunnel Co. *vs.* Bechtel Con. N. Y. Co., L. D., 584.)

It will be remembered that subsequent lode locations along a tunnel site are invalid only as to "veins not previously known to exist discovered in such tunnel;" in other words, "veins or lodes not appearing on the surface" (R. S. U. S., sec. 2323). But the answer of the respondent, the rejection of which by the trial court was said to be error, averred that no discovery of mineral in rock in place was made within the lode claims of the plaintiff until after its tunnel site was located. This broad allegation includes veins appearing on the surface as well as those not previously known

to exist, and under the decision of the Court of Appeals enables the respondent to defeat or postpone our patents, provided it can secure proof showing that our discovery of mineral, regardless of its character or previously known existence, was subsequent to the location of its tunnel; and this they aver is not inconsistent with the utterances of this court in Calhoun Co. *vs.* Ajax Co.

And, too, the court will find that the stricken answer alleges that the petitioner's patents were obtained in fraud of the Government for want of such discovery. Virtually, the Court of Appeals upholds such a plea in an action of ejectment; for it would admit proof of the fact from which the fraud must be deduced, if at all. This, indeed, is quite consistent; for, if a patent may be attacked collaterally on one ground, no good reason can be urged against such attack upon any other.

But the contention is made that because the petitioner at the trial offered its certificates of location in evidence, the respondent had the right to rebut its recitals as to discovery. Also that the petitioner thereby "sought to make the location certificate conclusive proof of discovery." Not so. The certificate was offered for one purpose only, and that purpose was to fix the date of location, and therefore the date of the relation about which there is no dispute between us. The same procedure was followed at the trial of the Calhoun-Ajax case, and, indeed, in every case where the relation of a patent became essential. As well might it be contended that because a plaintiff in foreclosure introduces a note to establish its date, the defendant thereby becomes invested with the right to prove that the mortgage in fact took effect only after the suit brought.

Since Mr. Lindley is quoted with approval by counsel, we may be pardoned for referring to his comments concerning the conclusiveness of a patent for mineral lands:

"The final certificate issued by a receiver of the United States land office after the payment of the purchase price

* * * has been repeatedly held to be the equivalent of a patent" (secs. 208, 771).

"A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken" (Lindley, sec. 777, citing Davis *vs.* Weibbold, 139 U. S., 507, and U. S. *vs.* Iron Silver Mining Co., 128 U. S., 673).

"*It is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inauguration of the right; that is to the location upon which the patent proceedings are based*" (Lindley, sec. 783; Heydenfeldt *vs.* Daney Co., 93 U. S., 634; Smelting Co. *vs.* Kemp, 104 U. S., 636; Deffenbach *vs.* Hawke, 115 U. S., 392).

The exception which this author makes to the rule announced is based on the Tyler-Chance case only, and *is limited to controversies where there is no surface conflict* and where the right to veins unite in depth or depart from vertical boundary lines. No such exception as the one here invoked and recognized by the Court of Appeals can be justified either by decision or text-writer.

Without affirming or denying the soundness or otherwise of the quotation made by respondent's counsel from the case of Evans *vs.* Durango Land Company, we may affirm that, if "designated to prevent fraud and injustice," there never was a case calling more loudly than this for its application. The petitioner secured its mining claims in good faith. They were senior in time, and therefore in right. They were superior to the respondent's tunnel site. It applied for patents based on their locations. It gave due notice of such application, as the law required. It made entry and secured Government title. It thus obtained the highest possible evidence of the integrity of its claims and the best possible security against all who would challenge its rights; yet when a trespasser boldly and wrongfully invades its premises, penetrates them with a tunnel, and takes possession of its property, its attempted ejectment is met by the plea that,

although its claims were located before the tunnel, they were entered afterwards. Hence, says the Court of Appeals, the defendants may show that its title was, as against the tunnel, worthless until entry, and therefore worthless altogether. We respectfully submit that the decision we complain of is *in the very teeth of Calhoun Co. vs. Ajax Co.*, is opposed to a long line of kindred decisions of this court, assails the integrity of every patent whose entry succeeded tunnel locations across their boundaries, unsettles titles, threatens vested rights in every mining district of the West, and, by departing from the salutary doctrines of this honorable court, will, if unhindered, bring no end of discord and confusion to many holders of Government mining patents throughout the mining regions.

We respectfully and earnestly ask this court to interpose, not alone for the petitioner's protection, but for the common benefit.

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